No. 80-660

IN THE SUPREME COURT OF THE

UNITED STATES

October Term 1980

SILVER SPUR CASINO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

Respondent.

AND RELATED CASES.

REPLY BRIEF FOR PETITIONERS

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I.

PRIOR CASES BEFORE THIS COURT RELIED ON BY THE BOARD AND THE UNION BUT NOT INVOLVING PETITIONERS NOR ISSUES PRESENTED HERE SHOULD NOT BE CONTROLLING

The Board and the Union assert that the instant cases present "a rehash of arguments already presented to this Court" in N.L.R.B. v. Tahoe Nugget, Inc.,

d/b/a Jim Kelley's Tahoe Nugget and Nevada Lodge, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921, and Sahara-Tahoe Corp. v. N.L.R.B., 581 F.2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). [Bd. Brief in Opp., pp. 4-5; Union Br. in Opp., p. 3.] This assertion ignores the declaration of the Ninth Circuit that in the instant cases:

> We recognize the force of [petitioners] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (fn.) [The footnote cites the cases from the other Circuits.] (Emphasis added. App. p. 14)

The Ninth Circuit opinion here is at odds with eight other circuits. Several of the cases Petitioners cited in the lower court were decided after this Court considered the Tahoe Nugget, Nevada Lodge

and Sahara-Tahoe decisions, as well as these cases involve separate issues. Further, the court below "accept[ed] arguendo that a conflict exists on the issue" (App. p. 14), which was not conceded in those earlier decisions. This "important and difficult question ... of current national interest" warrants the careful attention and consideration of this Court. Tahoe Nugget, Nevada Lodge and Sahara-Tahoe should not control as different, distinct issues are presented there.[1/]

By rejecting the analysis and authority of the other circuit courts of appeal, the Ninth Circuit has created

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1/ Justice White would have granted certiorari in Tahoe Nugget and Nevada Lodge. 442 U.S. 921. Further, several cases cited by the lower court here were not decided at that time. See, e.g., W & W Steel v. N.L.R.B., 599 F.2d 934 (10th Cir. 1979).

and conceded a clear, real and disrupting conflict among the circuits.[2/] That conflict is not "imaginary" [Union Br. in Opp., p. 7; Bd. Br. in Opp., p. 8].

2/ The Court listed those conflicting decisions in footnote 9 (App. p. 14):

> Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, e.g., Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir. 1970); Star Manufacturing Co. v. N.L.R.B., 536 F.2d 1192 (7th Cir. 1976); Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero Workers v. N.L.R.B., 416 F.2d 809 (D.C. Cir.), cert. denied, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); Teamsters Local U. 769 v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976); National Cash Register Co. v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974); National Car Rental System v. N.L.R.B., 594 F.2d 1203 (8th Cir. 1979); N.L.R.B. v. Alvin J. Bart & Co., Inc., 598 F.2d 1267 (2d Cir. 1979); W & W Steel Co. v. N.L.R.B., 599 F.2d 934 (10th Cir. 19790; Automated Business Systems v. N.L.R.B., 497 F.2d 262 (6th Cir. 1974); N.L.R.B. v. Nu Southern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971); N.L.R.B. v. Randall-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978).

The Court below, the Board and the Union have conceded the existence of that conflict, or failed to show it does not exist. Even the dissent in W & W Steel, which the lower court, Board and Union failed to distinguish, recognized at 599 F.2d 942, n. 4, the conflict created by the Ninth Circuit, "acknowledg[ing] that this presumption has not received universal acclaim", citing N.L.R.B. v. Tahoe Nugget, supra. In sum, the conflict which the lower court concedes, and the Board and Union gloss over, is an important and recurring one which this Court should resolve to maintain uniformity among the circuits in a major area of national labor relations and federal labor policy.

II.

THE BOARD-CREATED PRESUMPTION EFFECTIVELY ABROGATES PART OF THE NATIONAL LABOR RELATIONS ACT

The Board and Union argue that Petitioners simply did not overcome the so-called rebuttable presumption and rely on Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), to preclude "further review of that fact-bound issue." [Bd. Br. in Opp., pp. 10-11; Union Br. in Opp. pp. 10-13.] From the Union trustee's public concession that "less than 20 percent of the Reno-Tahoe area is unionized" (Supp. App., pp. 9, 13) and 11 other areas of evidence disclosing the clear lack of Union majority status [Pet. Op. Br., pp. 7, 17-18] to Petitioners' unsuccessful attempts to produce documents and other evidence from the Board and Union of further support to the conclusion that the Union lacked any

majority status, Petitioners met a stone wall. [Pet. Op. Br., pp. 21-25]

The result was a conclusive presumption created by Board fiat and adopted by the court below in contravention of federal labor law, federal evidence rules and fundamental rights of due process. By this conclusive presumption, upon which the Union's unfair labor practice charges were solely based, the Board permitted such charges to block Petitioners' attempts for single-unit elections. The statutory right of the employer to seek an election under Section 9(c) of the NLRA [29 U.S.C. §159(c)] was abrogated here by such Board fiat and the lower court's approval. This is diametrically opposed to the Congressional purpose of Section 9(c), "which gives [the employer confronted with a claim for recognition or a claim of majority support] the right to go to the Board and say 'I want an

election. I want to know who is the bargaining agent for my employees.'" 93 Cong.Rec. 3838 (1947) (Remarks of Senator Taft.) Accord, Linden Lumber Division, Summer & Co. v. N.L.R.B., 419 U.S. 301, 308, 95 S.Ct. 429, 433 (1974). In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918 (1969), this Court emphasized that the most traveled route for a union to obtain recognition as the exclusive bargaining representative:

> ... is through the Board's election and certification procedures under §9(c) of the Act [29 U.S.C. §159(c)]; it is also, from the Board's point of view, the preferred route. (395 U.S. at 596)

* * * *

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory -- indeed the preferred -- method of ascertaining whether a union has majority support. (Emphasis added.) (395 U.S. at 602)

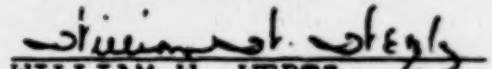
In short, the presumption abrogates the Petitioners' statutory right, to paraphrase Senator Taft, "to know who is the bargaining agent for [their] employees."

III.

CONCLUSION

The issues raised by Petitioners are constantly recurring ones affecting federal labor law and policy. Further, the conflict among the circuits discloses the confused state of national labor relations law administration on these issues, which should not be allowed to continue by the happenstance of the circuit court involved, but rather should be settled by clear, final resolution by this Court.

Respectfully submitted,



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December 5, 1980

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seeo 1983